



January 30, 2002

Ms. Ruth H. Soucy
Deputy General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2002-0451

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157946.

The Comptroller of Public Accounts (the "comptroller") received a request for certain information pertaining to Electronic Data Systems Corporation ("EDS"). The information at issue in this ruling was referred to in an earlier ruling from this office, Open Records Letter No. 2001-4835 (2001). In that ruling, EDS submitted arguments to this office for withholding information that the comptroller did not submit as responsive to the prior request. Thus, we found that if such information was in fact responsive, because the comptroller had not submitted it to this office as required by section 552.301(e)(1)(D) of the Government Code, the comptroller was required to release it in accordance with section 552.302 of the Government Code. As you now seek a ruling with regard to this "supplemental information," we assume that it was not in fact responsive to the earlier request, and thus not required to be released pursuant to section 552.302. We will therefore consider arguments for withholding the submitted information. You assert that a portion of the submitted information is excepted from disclosure under sections 552.136 and 552.137 of the Government Code. Pursuant to section 552.305, you also notified representatives of EDS of the request for their information and invited EDS to submit arguments to this office as to why the information at issue should not be released.¹ A representative of EDS timely responded to this office and contends that a portion of the information contained in the documents entitled "Consolidated Proposal" and "Additional Response to the State of Texas

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

CPA" is excepted from disclosure under section 552.110 of the Government Code. We have considered the submitted arguments and have reviewed the information at issue.

First, we note that EDS asserts that the information it seeks to withhold was submitted to the comptroller with the intention that it be kept confidential. We note, however, that information is not confidential under the Public Information Act simply because the party submitting it anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987). Furthermore, information is not excepted from disclosure merely because it is furnished with the expectation that access to it will be restricted. Open Records Decision No. 180 (1977). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987, 444 at 6 (1986).

We next address the applicability of section 552.110 to the requested information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

We first find that the information pertaining to EDS personnel which EDS seeks to withhold in pages 31, 32 and 38-123 of the Consolidated Proposal, and pages 1-35 and 40 of the Additional Response, is not excepted under section 552.110. See Open Records Decision No. 319 at 3 (1982) (stating that statutory predecessor to section 552.110 ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience). This information must be released to the requestor.³

Next, EDS seeks to withhold certain pricing information contained within pages 8-11 and 137 of the Consolidated Proposal and at the bottom of page 46 of the Additional Response. Upon review of the arguments submitted by EDS, we find that EDS has established that release of the information you have marked on pages 9-11 of the Consolidated Proposal would result in substantial competitive harm to EDS, and therefore, this information must be withheld under section 552.110(b).

EDS also seeks to withhold certain proprietary technical information and methodology found on pages 8-17, 18-26, 127-136, 140-154, and 177-186 of the Consolidated Proposal, and on pages 37-39 and 41-46 of the Additional Response. Upon review of the arguments submitted

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

³We note that although EDS seeks to withhold pages 38-123 of the Consolidated Proposal pertaining to project personnel and project personnel skills, the Comptroller has submitted as responsive only pages 38-40, 49-56, 90, and 97-100 from within this page range. Therefore, this ruling does not address the remainder of the EDS personnel information noted above, and is limited to the information submitted as responsive by the comptroller. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

by EDS, we find that EDS has established that release of the information we have marked on pages 15-17, 151-154, and 177-186 of the Consolidated Proposal, and of the information we have marked on pages 37-39 and 41-46 of the Additional Response, would result in substantial competitive harm to EDS, and therefore, this information must be withheld under section 552.110(b).

Finally, we note that although EDS has submitted arguments to this office for withholding other portions of its Consolidated Proposal, namely pages 8, 12-14, 18-26, 128-136, 137, 140-148, and 150 of the Consolidated Proposal, those pages were not submitted by the comptroller as being responsive. Therefore, this ruling does not address any information contained on these pages, and is limited to the information submitted as responsive by the comptroller. See Gov't Code § 552.301(e)(1)(D).

To summarize, the information pertaining to EDS personnel which EDS seeks to withhold is not excepted under section 552.110 and must be released to the requestor. EDS has established that release of the marked information on pages 9-11 of the Consolidated Proposal would result in substantial competitive harm to EDS, and therefore, this information must be withheld under section 552.110(b). EDS has established that release of the proprietary technical information and methodology we have marked on pages 15-17, 151-154, and 177-186 of the Consolidated Proposal, as well as the information we have marked on pages 37-39 and 41-46 of the Additional Response, would result in substantial competitive harm to EDS, and therefore, this information must be withheld under section 552.110(b). The remainder of the submitted information must be released to the requestor. As we resolve your request under section 552.110, we need not address your other raised exceptions.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 157946

Enc. Submitted documents

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